BEST AVAILABLE COPY

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE VWIL PROGRAM AT MARY BALDWIN COLLEGE PROVIDES SUBSTANTIAL BENEFITS THAT WOULD NOT BE AVAILABLE UNDER THE GOVERNMENT'S PROPOSED REMEDY OF A COEDUCATIONAL VMI. 3

A. Mary Baldwin College Designed the VWIL Program to Suit the Needs and Abilities of Real Students, Not Stereotypes. 3

B. The VWIL Program is a Rigorous, Multi-Disciplinary Educational Experience That Is Designed to Achieve Outcomes Comparable to Those Produced by VMI. 5

C. There Are Legitimate Reasons for Differences Between the VWIL and VMI programs. 7

II. RECENT STUDIES DEMONSTRATE THAT SINGLE-SEX EDUCATION PROVIDES SUBSTANTIAL BENEFITS TO WOMEN. 8

A. Single-Sex Education Contributes to Higher Academic Achievement and Self-Esteem in Women. 9

B. Single-Sex Education Has Been Linked with Greater Career Achievement. 15

C. Single-Sex Education Encourages Women to Pursue Male-Dominated Careers. 17

III. REVERSAL OF THE DECISION BELOW WILL THREATEN THE CONTINUED EXISTENCE OF MARY BALDWIN AND OTHER PRIVATE WOMEN'S COLLEGES. 20

A. Single-Gender Education Programs for Women Will Be Difficult to Justify on a Remedial Rationale. 20

B. Private Institutions Will Face a Loss of Government Financial Support..... 22

C. Private Institutions Will Face a Loss of Charitable Tax Exemption and Tax Deductible Contributions. 25

D. The Application of "Strict Scrutiny" Will Exacerbate the Threat to Private Women's Colleges. 28

CONCLUSION 29

TABLE OF AUTHORITIES

	PAGE
Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995)	21
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PAGE

STATUTES

20 U.S.C. § 1681(a)(1) & (5) (1988) 27
26 U.S.C. § 170 (1988) 25
26 U.S.C. § 501(c)(3) (1988) 25

TREASURY DETERMINATIONS

Rev. Rul. 71-447, 1971-2 C.B. 230 25
Rev. Rul. 75-231, 1975-1 C.B. 158 26

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PAGE

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PAGE

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BRIEF OF MARY BALDWIN COLLEGE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

Mary Baldwin College ("MBC") is a private four-year, liberal-arts college for women located in Staunton, Virginia. Founded in 1842, MBC has a long history of providing higher education in a single-sex setting and a track record of developing innovative degree programs. Total enrollment is over 2000. Approximately 800 women attend the four-year residential undergraduate program at the MBC campus, which successfully prepares its graduates for pursuit of careers as leaders in business and the professions.

MBC agreed to create the Virginia Women's Institute for Leadership ("VWIL") to serve as a remedy in this litigation, for three reasons. First, MBC believes that single-sex education conveys unique educational benefits and should be available to both women and men. Second, MBC is convinced that a wide array of educational options is crucial to the future strength of this Nation and should be publicly available. Third, VWIL presents an extraordinary opportunity; it is a forward-looking program which serves a real need for the young women of today.

SUMMARY OF ARGUMENT

VMI and MBC are unique institutions with their own distinctive campuses, histories, and cultures. Each has course offerings, facilities and traditions that are not found at the other. Such differences are inevitable whenever two colleges are compared. The courts below held that a parallel program for women need not be identical to VMI, and that differences can be justified by a variety of relevant factors.

The government and its *amici* have argued, to the contrary, that any significant difference between VMI and VWIL is constitutionally intolerable, and that the only acceptable remedy is to require VMI to admit women. This is tantamount to a position that coeducation is constitutionally mandated. It would be virtually impossible for a state to maintain separate educational institutions for men and women that are identical in all respects. It would also be unwise to require such institutions to mirror each other when the needs and interests of the students at each institution may differ.

The design of the VWIL program reflects the best professional judgment of the faculty and administration of MBC. VWIL's content and methodology are based on contemporary research on leadership and the benefits of single-sex education. The program is founded on the belief that women can and do provide significant leadership in the military and other traditionally male-dominated fields, that career opportunity is not restricted by gender, and that single-sex education is for many women better than coeducation in achieving these goals.

Although the outcomes of the two programs are in all significant respects the same, the VWIL program differs somewhat from VMI in how these outcomes are achieved. These differences are the result of a careful planning process and are not the consequence of inattention or stereotypical views about the roles or abilities of women. The courts below properly found that the VWIL program is soundly designed and fully capable of meeting its objectives.

In addition to its interest in maintaining the VWIL program, MBC supports the option of single-gender education for males and females. The courts below in this case have found that single-sex education is pedagogically justified for both men and women. MBC also believes that, for legal and practical reasons, single-sex education for women will be threatened if single-sex education for men is outlawed.

ARGUMENT

I. THE VWIL PROGRAM AT MARY BALDWIN COLLEGE PROVIDES SUBSTANTIAL BENEFITS THAT WOULD NOT BE AVAILABLE UNDER THE GOVERNMENT'S PROPOSED REMEDY OF A COEDUCATIONAL VMI.

A. Mary Baldwin College Designed the VWIL Program to Suit the Needs and Abilities of Real Students, Not Stereotypes.

The Equal Protection Clause does not dictate that MBC conduct a program identical to that of VMI. However, the Court's analysis of this constitutional issue should be based upon an accurate characterization of the VWIL program, not the exaggerated presentation found in briefs submitted by certain of the government's *amici*. Those briefs would lead the Court to believe that the VWIL program is a "watered-down VMI" founded on archaic stereotypes about women rather than on careful analysis. Such caricatures of VWIL are contradicted by the facts in the record.

The VWIL program was designed by a task force of educators, not by lawyers. The charge of the Task Force was to design the best possible baccalaureate program for women that would produce ambitious and capable graduates, providing the nation with leadership in the public and private arenas.

The Task Force was created by MBC's President, Cynthia H. Tyson, and co-chaired by Dean James D. Lott and Dean Heather Anne Wilson. Dr. Tyson, Dr. Lott and Dr. Wilson collectively have more than 70 years' experience in single-gender education for women. The Task Force included faculty members, administrators and students; it also called upon *ad hoc* members with expertise in the areas of physical education and training, computer science, ROTC, and developmental psychology.

VWIL began operation in August 1995 and is already

achieving its goals. There are far more similarities between the VWIL and VMI programs than there are differences. Both are intellectually and physically rigorous, highly structured single-sex baccalaureate programs. Both develop students' leadership skills, foster self-discipline and personal integrity, and cultivate team-building skills. An important factor in both is the building of a sense of community and of personal responsibility to that community. And both provide many opportunities for the practice of leadership in a variety of settings.

To be sure, the VWIL program differs in a number of ways from the VMI program. Some of these differences are the result of predictions by MBC and its Task Force about the needs and interests of the students who would attend the VWIL program. These predictions were not based on outmoded stereotypes but instead reflect actual experience in women's education and a recognition that there are often real differences in the physical and developmental characteristics of college-age men and women.

Educational programs such as VWIL must be designed to attract and meet the needs of students with a range of abilities and interests.[1] The demand for residential military college programs among women is quite small. MBC determined that there would be little, if any, demand for a women's program that adopted all of the elements of the VMI system. There has never been, and no educational expert (including the government's experts in this case) has ever recommended, the establishment of a military college

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[1]For this reason, designing an educational program is not analogous to the situation presented in *J.E.B. v. Alabama, ex rel. T.B.*, 114 S. Ct. 1419 (1994). A peremptory strike necessarily applies to a particular individual. A college program cannot be designed to fit the particularized needs of each student.

program for women including the rat line and other elements of the extreme adversative method at VMI.

It would have been possible to design the VWIL program to more closely resemble VMI, with adversative techniques associated with the rat line and barracks-like living quarters. Simply replicating an existing program would have required far less thought, research, and educational expertise. But such a facile approach would have produced a paper program with no real prospect of successful implementation. MBC believes it would be professionally irresponsible to compromise student welfare by designing a program to meet litigation objectives instead of student needs.

B. The VWIL Program is a Rigorous, Multi-Disciplinary Educational Experience That Is Designed to Achieve Outcomes Comparable to Those Produced by VMI.

Both VWIL and VMI offer students the substantial benefits of a single-sex educational environment. Just as important to the outcome is the augmentation of these benefits with a holistic, 24-hour-a-day leadership development environment. Both programs are highly structured and mentally and physically rigorous. In both programs, academic requirements, co-curricular activities, student government, and residence life are interrelated and geared toward the building of personal integrity and leadership skills. The five central goals of the two programs are identical: rigorous baccalaureate-level education, military training, mental and physical discipline, character development, and leadership development. Both programs have the mission of producing "citizen" soldiers.

The outcome for students in both programs is preparation for successful careers and leadership in whatever field they choose; no distinction is made by either VWIL or VMI in terms of what careers or avocations are "appropriate" for either sex. In fact, the VWIL requirements in military

training, math, science, and computer science explicitly encourage women to explore and excel in traditionally male-dominated fields.

In VWIL, students must complete four interdisciplinary courses which provide students with an awareness of what leadership requires. Moreover, as at VMI, within VWIL there are many opportunities to practice leadership, in addition to the over 150 leadership positions available in the residential MBC undergraduate program as a whole.

The VWIL and VMI physical and health education programs require the same amount of training. In each program, students must take physical fitness tests, complete eight semesters of physical education courses, and undergo additional physical training. The physical fitness standards for the women in VWIL are just as strenuous as those for men at VMI. VWIL's "leadership challenge" program, mandatory for all freshmen who are not participating in varsity athletics, is directly analogous to and uses many of the same facilities as VMI's rat challenge, which is mandatory for all first-year students except those who are participating in varsity athletics.

Both programs require four years of ROTC training, and in fact the ROTC requirements of VMI cadets and VWIL cadets are identical. The same options are available to students in the two programs--Navy, Marine Corps, Army, and Air Force--and all VMI and VWIL students may elect to seek a commission. In fact, ROTC scholarships are held by students in both programs. Seeking a commission is, however, not mandatory in either program. Each student spends two hours in class and lab each week; the facilities, faculty, and options for VWIL and VMI cadets are exactly the same. In addition to ROTC activities, VMI cadets drill within their cadet corps, and VWIL students spend about 25 hours a semester in drill and ceremonies training on the MBC campus.

Both programs develop strong bonding and sense of

community among the students. In VWIL, this process started during the VWIL orientation week, prior to regular MBC freshman orientation. This VWIL orientation included a variety of mentally and physically challenging activities. At both VMI and VWIL, mandatory co-curricular activities contribute to the development of community.

In short, the goals of VWIL and VMI are the same, and the methodologies employed to attain those goals have many of the same elements.

C. There Are Legitimate Reasons for Differences Between the VWIL and VMI programs.

The VWIL program differs somewhat from VMI but is not inferior.[2] Some of these differences are attributable to the fact that the VWIL program operates in conjunction with the traditional undergraduate program at MBC. The Task Force decided that VWIL students should not reside in a separate dormitory for four years, wear uniforms at all times, or eat their meals apart from the other MBC students. These decisions were based not on stereotypical assumptions but on their professional judgment that the VWIL students would have a more satisfactory college experience, with more opportunities for leadership, if they

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[2]The government does not argue that the financial support provided by the Commonwealth to VWIL is inadequate or unequal to that provided to VMI. The remedial plan requires the Commonwealth to provide financial support for students attending the VWIL program that is equal to that provided for VMI students. In addition, the VMI Foundation will provide the VWIL program with a permanent endowment of $5.4625 million and make other financial contributions to bring the total to nearly $7 million, an amount which one expert witness described as "lavish" for a program of this kind. Remedy Tr. 1543-44.

were integrated into the larger MBC community.

There are also some differences due to institutional autonomy. For example, MBC believes that its honor code is as effective in defining responsibility to the community and inculcating integrity as VMI's honor code. It would be the height of irony for the government, in the name of women's rights, to seek to compel MBC to abandon its traditions and mimic the practices of VMI when there is no good reason to do so.

Finally, there are differences resulting from the fact that VWIL is a new program and VMI has been in existence for many years. There are benefits to participation in a new program, which can include a sense of excitement and challenge that may not be available to those who simply follow the traditions of the past. The VWIL program has been designed in light of the most current research on leadership development and educational methodology. VWIL students also share in the traditions of MBC and will have the benefits of the alumni networks of both MBC and VMI.

In summary, while the VWIL program is admittedly different in some respects from the VMI program, these differences have legitimate justifications and generally enhance the value of the program to its participants. MBC believes, and the courts below agreed, that the VWIL program offers women benefits that are at least as valuable as those offered to men by VMI.

II. RECENT STUDIES DEMONSTRATE THAT SINGLE-SEX EDUCATION PROVIDES SUBSTANTIAL BENEFITS TO WOMEN.

An impressive body of recent studies demonstrates that single-sex schools lead to higher achievement and self-esteem in women, encourage women to pursue traditionally male-dominated careers, and alleviate some of the disadvantages a number of women may suffer in a coedu-

cational setting.

A. Single-Sex Education Contributes to Higher Academic Achievement and Self-Esteem in Women.

Recent studies strongly suggest that, at both the secondary and college levels, women in single-sex schools not only outperform their peers in mixed-sex schools, but show higher levels of self-esteem and a greater sense of personal control.

In one of the most frequently cited of these studies, Professors Valerie Lee and Anthony Bryk compared the effects of single-sex and mixed-sex Catholic secondary schools on a number of specific variables, including areas of academic achievement, achievement gains, educational aspirations, self-image, sense of personal control over environment, and attitudes and behaviors related to academics.[3] *See* Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J. EDUC. PSYCHOL. 381 (1986) (hereinafter "Lee & Bryk (1986)"). Analyzing data from a longitudinal study of randomly-selected high school sophomores and seniors entitled "High School and Beyond," Professors Lee and Bryk "found that single-sex schools appear to deliver specific advantages to their students." *Id.* at 394. Relative to their peers in the coeducational schools, girls from the single-sex schools were more likely to "express specific interests in both mathematics and English," *id.* at 387, demonstrated

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[3]Because of the scarcity of single-sex public schools in this country, several of the studies comparing single-sex and mixed-sex secondary schools have used data from private Catholic schools. For a discussion of the formal and informal structure of these Catholic schools, *see* Cornelius Riordan (hereinafter "Riordan (1990)") GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE? 62-81 (1990).

"significantly greater gains in reading, science, and educational ambition over the course of their high school years," *id.* at 394, and had higher ratings for self-image and sense of personal control, *id.* at 386.

Professors Lee and Bryk attributed these positive results to the absence of distractions and pressures caused by members of the opposite sex:

> [S]ingle-sex secondary schooling may in fact serve to sensitize young women to their occupational and societal potentials in an atmosphere free of some of the social pressures that female adolescents experience in the presence of the opposite sex. Adolescence is a critical period for the formation of attitudes about oneself. It may be that some separation of students' academic and social environments removes the distractions that can interfere with the academic development of some students.

Id. at 394. A follow-up study based on additional data obtained after graduation demonstrated that the beneficial effects of single-sex high school experience persisted into the college years. *See* Valerie E. Lee & Helen M. Marks, *Sustained Effects of the Single-Sex Secondary School Experience on Attitudes, Behaviors, and Values in College*, 82 J. EDUC. PSYCHOL. 578 (1990) (hereinafter "Lee & Marks").[4]

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[4]Although most of the studies analyzing the "High School and Beyond" data have found significant advantages for single-sex schools, one study found no significant effects. *See* Marsh, *Effects of Attending Single-Sex and Co-educational High Schools On Achievement, Attitudes, Behaviors and Sex Differences*, 81 J. EDUC. PSYCHOL. 70 (1989). Professors Lee and Bryk have criticized this study on methodological grounds. *See* Lee & Bryk, *Effects of Single-Sex Schools: Response to Marsh*, 81 J. EDUC. PSYCHOL. 647 (1989).

The work of Cornelius Riordan, an Associate Professor of Sociology at Providence College, supports these findings. Professor Riordan conducted three recent studies on single-sex education which culminated in a book, Riordan 1990, *supra*. In the first of these studies, Professor Riordan analyzed data from the "High School and Beyond" survey to examine the influence of single- and mixed-sex Catholic school education on advanced mathematics, writing, science, civics, self-esteem, and sense of personal control. *Id.* at 82-113. The results significantly favored the single-sex schools. On average, girls in the single-sex schools "score[d] about one-third of a grade equivalent higher than girls in mixed-sex schools," scoring "almost one full year" higher in science. *Id.* at 112. Girls in the single-sex category also scored higher on measures of self-esteem and personal control than did the girls in the mixed-sex category. *Id.* at 109-10.[5]

In the second of his three studies, Professor Riordan investigated the long-term outcomes of single-sex education. Riordan (1990), *supra*, at 114-15, 129-34. This study analyzed questionnaire and performance test data from the National Longitudinal Study of the High School Class of 1972, a survey that recorded performance test and questionnaire data from high school seniors in the year 1972,

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[5]The results of Professor Riordan's 1990 study are consistent with an earlier study in which he compared the effects of single-sex Catholic, mixed-sex Catholic, and mixed-sex public schools. *See* Cornelius Riordan, *Public and Catholic Schooling: The Effects of Gender Context Policy*, 93 AM. J. EDUC. 518 (1985). Although Riordan found virtually no difference between the mixed-sex Catholic and mixed-sex public schools, the performance of students from the Catholic single-sex schools was significantly greater than the performance of students from the mixed-sex schools. *Id.* at 536.

and collected additional data from those same students for the years 1973, 1974, 1976, 1979 and 1986. Professor Riordan concluded that the beneficial effects of single-sex education on cognitive ability persist as many as seven years after graduation from high school. *Id.* at 134. In addition, the girls from the single-sex high schools "achieved higher education than their female counterparts from mixed-sex high schools." *Id.*

Professor Riordan's work also demonstrates that the benefits of single-sex education are not limited to the secondary school level. In the third of his three recent studies, he used the National Longitudinal Study of the High School Class of 1972 to compare data from women who had attended single-sex colleges. *Id.* at 116-28, 133-34. The study found that "women's colleges have a very strong influence on both educational and occupational achievement." *Id.* at 133.

In analyzing the results of his extensive research, Professor Riordan has concluded that

> [S]ingle-sex schools offer an environment that is more conducive to learning than mixed-sex schools, especially for women. They provide more role models for students, and they offer more order and control than mixed-sex schools. In all-girl schools, the adolescent climate is weak, allowing an academic climate to flourish.

Id. at 151.

Professor Riordan's results are consistent with a study by Daryl G. Smith, a Professor of Education and Psychology at the Claremont Graduate School. *See* Smith, *Women's Colleges and Coed Colleges: Is There A Difference For Women?*, 61 J. HIGHER EDUC. 181 (1990). Analyzing data from students enrolled in single-sex and coeducational colleges in 1982 and questioned four years later, Professor Smith found that "women's colleges relate positively to a variety of measures of student satisfaction, perceived

changes in skills and abilities, and educational aspirations and educational attainment." *Id.* at 191. Significantly, students from the women's colleges were more likely to obtain a degree from their institutions than their counterparts at the coeducational colleges. *Id.* at 191-92. Students from the women's colleges also gave high ratings to measures "having to do with the academic program of the institution and the contact with faculty and administration, as well as on perceived changes in values of tolerance and cultural awareness." *Id.* at 191. The only area where students from coeducational schools rated their experience more positively than did students from the women's colleges was in the area of social life.[6] *Id.* at 192.

Most recently, a study by doctoral candidate Mikyong Kim and Professor of Sociology Rodolfo Alvarez of the University of California at Los Angeles analyzed longitudinal data from women enrolled in single-sex and coeducational four-year colleges during the period 1987-91. Kim

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[6]Professor Smith analogized his findings to those of Professor Alexander Astin in FOUR CRITICAL YEARS: EFFECTS OF COLLEGE ON BELIEFS, ATTITUDES, AND KNOWLEDGE (1977). In a more recent study, Professor Astin has suggested that "institutional type, as such, has little direct effect on student development." *See* A. Astin, WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED 323 (1993). Nevertheless, Astin still found that attending a women's college was positively associated with numerous factors including baccalaureate completion, satisfaction with faculty and overall quality of instruction, leadership measures, writing skills, analytical and problem-solving skills and critical thinking ability. *Id.* at 324. Most of these positive effects were "directly attributable to attending a women's college" and could not "be entirely explained or accounted for on the basis of other characteristics, such as small size, residential emphasis, and private control." *Id.* at 325.

& Alvarez, *Women-Only Colleges: Some Unanticipated Consequences*, 66 J. HIGHER EDUC. 641 (1995). This study found that women's colleges were more effective than coeducational colleges in improving their students' academic ability and social self-confidence. *Id.* at 651, 653. The authors suggest that "a partial reason for the positive impact of women-only colleges is that their women students are surrounded by peers having high intellectual self-esteem." *Id.* at 651. The authors observe that "women-only colleges appear to provide students better opportunities to be actively involved in student organizations, to exercise leadership, and thus to improve their social self-confidence." *Id.* at 661.[7]

The authors conclude as follows:

> Finally, public policy makers would be well advised to continue support for women-only colleges. Social and financial support for women-only colleges should

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[7]The one area where the authors found no advantage or disadvantage to women's colleges was in preparation for entry into graduate or professional schools. The study also found that women seniors at coeducational colleges were more likely to have acquired job-related skills. Kim & Alvarez, *supra*, at 661. The authors suggest that these findings may be attributable in part to the fact that women's college faculty are disproportionately concentrated in the humanities and social sciences. *Id.* at 658. The authors also suggest that, despite these results, "women-only colleges' strength in developing social self-confidence as well as academic ability may provide a long-term foundation for higher proportions of career achievers among their graduates, compared to their coeducational counterparts." *Id.* at 661. Moreover, regardless of what may be the case at other women's colleges, MBC's undergraduate program has a strong emphasis on career development, and the VWIL program requires substantial course work in math and science.

> be based on demonstrated long-term organizational effectiveness among dimensions that are educationally important for women students, rather than on transitory views not supported by research.

Id. at 662.

B. Single-Sex Education Has Been Linked with Greater Career Achievement.

In addition to those studies that measure achievement through questionnaire data, performance tests, and school records, there are studies suggesting that women graduates of single-sex colleges are more likely than their peers at coeducational institutions to have been recognized for their career achievement.

In the first of these studies, Professor Elizabeth Tidball of George Washington University Medical Center analyzed a sample of randomly-selected women cited in "Who's Who of American Women." *See* Tidball, *Perspective on Academic Women and Affirmative Action*, 54 EDUC. REC. 130 (1973) (hereinafter "Tidball (1973)"). She concluded that, relative to the total number of their women graduates, the women's colleges produced a higher proportion of "achievers" than did the coeducational colleges. *Id.* at 132.

Some later studies have criticized the Tidball study on the ground that a disproportionate number of the "achievers" who had graduated during the years under study (1910 through 1940) were from the highly selective Seven Sisters Colleges (Barnard, Bryn Mawr, Radcliffe, Mount Holyoke, Smith, Vassar, and Wellesley). Notwithstanding these criticisms, more recent studies have suggested that women's colleges do play an important role in producing successful graduates. In one such study, Professor Tidball reanalyzed her own data and found that, relative to the total number of women graduates, "highly selective women's colleges were twice as likely to have produced achievers as were the highly selective coeducational colleges." *See* Tidball,

Women's Colleges and Women Achievers Revisited, 5 SIGNS: J. WOMEN CULTURE & SOC'Y 504, 512 (1980). "Similarly, all other women's colleges were twice as likely to have produced achievers as were all other coeducational colleges." *Id.* at 512.

A more recent study partially replicated Professor Tidball's results using data from women achievers who had graduated in more recent decades. Rice & Hemmings, *Women's Colleges and Women Achievers: An Up-date*, 13 SIGNS: J. WOMEN CULTURE & SOC'Y 546 (1988) (hereinafter "Rice & Hemmings"). Although the results were not statistically significant, the study found that in proportion to the total number of women graduates women's colleges had one and one-half as many graduates who were achievers as did the coeducational colleges during the decade of the 1970's. *Id.* at 556.

The success of women's colleges in producing a high rate of women achievers has been the subject of much discussion. Professor Tidball attributed her results to the prevalence of female faculty role models and mentors at women's colleges. She found that, for both single-sex and coeducational colleges, the number of "career-successful women graduates" increased as the ratio of women faculty members to women students increased. Tidball (1973), *supra*, at 135. Other researchers have similarly concluded that "[t]here seems little question that an environment in which many women teachers and mentors provide traditional and nontraditional examples of achievement is an advantage to young women." Rice & Hemmings, *supra*, at 558.[8]

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[8]The Kim and Alvarez study, on the other hand, questions Tidball's hypothesis that the success of women's colleges is attributable to their higher proportion of female faculty members. They found that "percent of female faculty as a variable was *not* a significant positive predictor for any

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While it may be difficult to isolate the specific reasons why women's colleges have been successful in producing a high rate of women achievers, these studies indicate that women's colleges offer significant advantages over coeducational institutions.

C. Single-Sex Education Encourages Women to Pursue Male-Dominated Careers.

A diverse body of literature suggests that women attending single-sex schools may be more likely than their peers at coeducational schools to pursue male-dominated careers.

Following her pioneering study on women achievers in 1973, Professor Tidball performed three additional studies to examine the baccalaureate origins of scientists and scholars, men and women entering medical school, and men and women with natural science doctorates. *See* Tidball & Kistiakowsky, *Baccalaureate Origins of American Scientists and Scholars*, 198 SCI. 645 (1976); Tidball, *Baccalaureate Origins of Entrants into American Medical Schools*, 56 J. HIGHER EDUC. 385 (1985); Tidball, *Baccalaureate Origins of Recent Natural Science Doctorates*, 57 J. HIGHER EDUC. 606 (1986). In each of these studies, Professor Tidball found that, relative to the total number of women graduates, the women's colleges produced a significantly higher proportion of graduates in these fields of study than did coeducational colleges.

In another study, Professor of Sociology Marvin Bressler

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dimension of women students' development in any of our analyses." Kim & Alvarez, *supra*, at 661. Although these scholars found a supportive institutional environment to be generally quite important, they attribute much of the unique success of women's colleges to the nature of peer interactions among students. *Id.* at 661-62.

of Princeton University and his colleague Peter Wendell explored the impact of single-sex and mixed-sex colleges on career aspirations. *See* Bressler & Wendell, *The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations*, 51 J. HIGHER EDUC. 660 (1980). Analyzing responses to a national survey of male and female undergraduates enrolled in single-sex and coeducational colleges, the study concluded that between freshman and senior year, there was a significant increase in the number of women from single-sex colleges who intended to pursue more "masculine" vocations. *Id.* at 660.[9] In contrast, the coeducational colleges had "no appreciable demonstrable influence on the career ambitions of either sex." *Id.* at 662. Based on these results, the researchers suggested that "sexual parity in the occupational domain might be better served if larger numbers of young women were to enroll in single-sex colleges." *Id.*

A more recent study analyzing questionnaire data from college women has suggested that single-sex education along with family structure plays an important role in influencing career choice. *See* Rubenfield & Gilroy, *Relationship Between College Women's Occupational Interest and a Single-Sex Environment*, 40 CAREER DEV. Q. 64 (1991). The study found that, although there are numerous factors that might affect a woman's career choice, "the opportunity to interact in a single-sex environment is important at some stage of a young women's life, if she is to develop nontraditional interests." *Id.* at 70.

These studies on career choice are consistent with other studies demonstrating that women who attend single-sex

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[9]Among the "masculine" professions included in the study were college professor, lawyer, physician, accountant, business executive, business owner, engineer, scientific researcher, and religious professional.

colleges or high schools have less stereotypical views about gender roles than do women attending coeducational schools. Professor Lee and her colleagues have shown that women who attend single-sex high schools or single-sex colleges have less stereotypical views about the compatibility of work and motherhood, and the traditional role of men. Lee & Bryk (1986), *supra*, at 389; Lee & Marks, *supra*, at 584-85. Similarly, Professor Riordan demonstrated that women graduates of single-sex colleges and high schools hold "more liberal attitudes toward working women" and "much stronger views toward equal sex roles" than their peers at single-sex schools. *See* Riordan (1990), *supra* at 110, 133-34.

Yet another body of research has indicated that single-sex education may have a positive effect on women's participation and interest in the traditionally male-dominated fields of mathematics and science.[10] One study, for example, concluded that single-sex high school physics classes had a "statistically significant, positive influence upon girls' interest in physics-related careers, while mixed-sex classes may have had a slight negative influence." Stowe, *Should Physics Classes Be Single Sex?*, Physics Teacher, Sept., 1991, at 380.

A similar study of single-sex classes in post-primary

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[10]A substantial number of studies have shown that girls generally participate less, receive less teacher attention, and show less interest and confidence than do boys in the subjects of mathematics and science. *See, e.g.*, American Association of University Women, *How Schools Shortchange Girls 24-30* (1992); American Association of University Women, *Shortchanging Girls, Shortchanging America 12-14* (1991); Becker, *Differential Treatment of Females and Males in Mathematics Classes*, 12 J. RES. MATHEMATICS EDUC. 40 (1981).

schools in Australia concluded that "students in single-sex classes indicated significantly higher gains in confidence over time than those in mixed-sex classes" and that this confidence "significantly increased the likelihood" of "subsequent participation" in mathematics. Rowe, *Single-Sex and Mixed-Sex Classes: The Effects of Class Type on Student Achievement, Confidence and Participation in Mathematics*, 32 AUSTRALIAN J. EDUC. 180, 195-96 (1988). These findings may be of critical importance given a recent study indicating that adolescents who like math and science "express stronger desires for careers as teachers, doctors and scientists" and "are more likely to aspire to careers as professionals." *American Association of University of Women, Shortchanging Girls, Shortchanging America 15* (1991).

III. REVERSAL OF THE DECISION BELOW WILL THREATEN THE CONTINUED EXISTENCE OF MARY BALDWIN AND OTHER PRIVATE WOMEN'S COLLEGES.

The government and some of its *amici* seek to reassure the Court and their constituencies that a decision against VMI in this case would have no implications for the continued existence of single-sex education for women, particularly at private institutions. In truth, a decision favoring the government in this case could produce substantial obstacles to any public or private educational program that admits only women.

A. Single-Gender Education Programs for Women Will Be Difficult to Justify on a Remedial Rationale.

The government and some of its *amici* have suggested that single-gender education for women can be sustained even if single-gender education for men were held to be unconstitutional, based on a theory of compensating for past discrimination. The legal predicate for this theory is weak.

This Court explicitly rejected such a compensatory rationale in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 727-28 (1982). The Court has made it clear that "benign" discrimination will not be automatically upheld on such a compensatory rationale and that a close fit must be established between past conduct violating the Constitution and a remedy limited to counteracting the effects of such conduct. It would be difficult for women's colleges to justify their admissions policies under this sort of scrutiny.[11]

Also problematic is the factual case for women's colleges as a remedy for past discrimination. Although discrimination against women undoubtedly persists in some ways, there is not much evidence that it inhibits access to a college education. In 1960, women comprised only about a third of the undergraduate college population and were excluded from most of the Ivy League colleges and a number of public colleges such as the University of Virginia. Today, women comprise approximately 55 percent of the nation's 14 million college students. U.S. Dep't of Commerce, STATISTICAL ABSTRACT OF THE UNITED STATES 179 (1995). Women today are substantially more likely to graduate from high school and to attend college than their male counterparts. U.S. Dep't of Commerce, *supra*, at 152, 153, 168. As a statistical matter, our educational system seems to be shortchanging men more than

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[11]Indeed, some of the government's amici seem to recognize as much, since they go so far as to argue that the Court should overrule such recent decisions as *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995), and *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), in order to hold that benign discrimination is not subject to the same degree of scrutiny as invidious discrimination. Brief of the Employment Law Center, et al., at 25-30.

women.[12]

In short, the educational system in this country is and has been for many years fully open to women. As a result, the "remedial" justification for women's colleges would not likely survive constitutional scrutiny in the event the Court were to hold that publicly supported single-sex education for men is unconstitutional.

B. Private Institutions Will Face a Loss of Government Financial Support.

It is also illusory to think that the impact of a constitutional ruling on single-gender education could be limited to public institutions. Although MBC is a private college, it receives substantial amounts of state and federal financial support. In addition to financial support of the VWIL program, the Commonwealth provides tuition assistance grants for its residents who attend MBC. It is unlikely that MBC or any other private women's college could survive without some form of government financial assistance to the school or its students.[13]

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[12]The problem is particularly severe for African American males. Only 38.5 percent of black college students are male. U.S. Dep't of Commerce, *supra*, at 179.

[13]Public funds directly or indirectly provide a substantial portion of the operating budgets of private educational institutions. In the 1990-91 school year, private institutions of higher education derived approximately 19 percent of their budgets from federal, state, and local government funds, *not including* financial aid to students. *See* U.S. Department of Education, National Center for Education Statistics, DIGEST OF EDUCATION STATISTICS 38 and Note (1993). In addition, private colleges and universities benefited from massive public expenditures for student financial aid in the form of grants and scholarships, guaranteed student loan programs, work study payments, and the like. More than 49 percent of full-time

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If the Supreme Court holds that the Equal Protection Clause bars government-supported single-sex education at VMI, that holding could well result in the invalidation of most or all governmental financial support for students attending private single-sex schools. This is not to say that the receipt of government assistance turns colleges into "state actors" who violate the Constitution by discriminating on the basis of sex. Rather, it is the government itself that would violate the Constitution by subsidizing private discrimination in which it could not engage directly.

In *Norwood v. Harrison*, 413 U.S. 455 (1973), black students challenged a Mississippi statutory program under which textbooks were purchased by the State and loaned to all students attending public and private schools in the State, including private schools alleged to have racially discriminatory admissions policies. Noting that "[t]his Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools," the Supreme Court held that "[a] textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by . . . [those] cases." *Id.* at 463 (footnote and citation omitted). Accordingly, the Court held that even indirect government aid to racially discriminatory schools was barred by the Equal Protection Clause:

> Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that **a state may not induce, encourage or promote private persons to accomplish what it is constitu-**

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students attending private non-profit undergraduate institutions in 1989-90 received some form of federal financial aid, and more than 30 percent received state financial aid. *Id.* at 313.

tionally forbidden to accomplish.'"

Id. at 463-65 (footnote and citation omitted) (emphasis added).[14]

The *Norwood* Court's holding was not dependent on any showing of a direct causal link between the challenged state program and the discriminatory conduct of the private actors: "[T]he Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school." *Id.* at 465-66. In the Court's view, "the constitutional infirmity of the Mississippi textbook program is that it significantly aids the organization and continuation of a separate system of private schools which . . . may discriminate if they so desire. **A State's constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination."** *Id.* at 467 (emphasis added).

Direct public financial assistance to private single-sex schools obviously "giv[es] significant aid to" those institutions. Like the textbook program invalidated in *Norwood*, moreover, federal and state financial aid to students attending private single-sex schools also provides substantial benefits to those schools. As the Supreme Court said in *Grove City College v. Bell*, 465 U.S. 555, 565-66 (1984), "[t]he economic effect of direct and indirect assistance often is indistinguishable," and Congress made clear its "awareness that the student assistance programs established

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[14] *Accord Cooper v. Aaron*, 358 U.S. 1, 19 (1958) ("State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws.").

[by federal law] . . . would significantly aid colleges and universities." Under the holding of *Norwood*, if publicly supported single-sex education is unconstitutional, government financial aid to students attending private single-sex schools would appear to be equally impermissible.[15] Accordingly, an adverse decision in the VMI case could strike a severe financial blow to private single-sex education in this Nation both by invalidating all forms of direct public financial assistance to single-sex schools and by denying students at such schools access to a major source of financial aid.

C. Private Institutions Will Face a Loss of Charitable Tax Exemption and Tax Deductible Contributions.

Under the Internal Revenue Code, charitable organizations, including those organized for "educational" purposes, are generally exempt from federal income taxes, and taxpayers may deduct their contributions to such organizations. 26 U.S.C. §§ 170, 501(c)(3) (1988). In Rev. Rul. 71-447, 1971-2 C.B. 230, however, the IRS ruled that racially discriminatory private educational institutions are not entitled to these tax benefits. The IRS explained that "[a]ll charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy." *Id.* Because congressional enactments, judicial decisions, and the like evidenced a strong national policy against racial discrimination in education, the IRS concluded that racially discriminatory pri-

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[15] *See also Ridgefield Women's Political Caucus, Inc. v. Fossi*, 458 F. Supp. 117 (D. Conn. 1978) (Newman, J.) (applying *Norwood*, court enjoined town from conveying government property at below-market price to a private single-sex organization).

vate schools were contrary to this public policy and were therefore not "charitable" within the meaning of the Internal Revenue Code. *See also* Rev. Rul. 75-231, 1975-1 C.B. 158.

In *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), the Court upheld these IRS rulings, applying essentially the same rationale. Construing the tax code by reference to common-law principles, the Court first held that "an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy," because at common law "the purpose of a charitable trust may not be illegal or violate established public policy." *Id.* at 586, 591. The Court then concluded that racial discrimination in education is contrary to established public policy, pointing to cases such as *Brown v. Board of Education* that "establish[] beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy." *Id.* at 593. The Court also relied on congressional enactments prohibiting racial discrimination in federally funded educational programs and in other areas. *Id.* at 594.

Under the reasoning of Rev. Rul. 71-447 and *Bob Jones*, private single-sex educational and other charitable organizations could lose their tax-exempt status (and their all-important ability to receive tax-deductible charitable contributions) if public single-sex education such as that offered by VMI were declared unconstitutional. Indeed, one leading tax-law expert has already taken the position that a donation for educational purposes is contrary to public policy and generally not deductible if it discriminates on the basis of sex.[16] This argument would be difficult to re-

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[16] *See* Martin D. Ginsburg, *Sex Discrimination and the IRS: Public Policy and the Charitable Deduction*, 10 TAX NOTES 27, 28 (1980) (the "generally applicable federal policy against sex discrimination" precludes charitable-deduction treatment

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fute if the Supreme Court were to invalidate public single-sex education in *VMI*. Just as *Brown v. Board of Education* demonstrated the public policy against racial discrimination in *all* education even though its holding and rationale applied only to public schools, so an unfavorable ruling in the VMI case would necessarily demonstrate a clear public policy against single-sex admissions policies in *all* education.[17] Even though Congress has not seen fit to prohibit such schools altogether,[18] this public policy could nevertheless preclude these schools and similar institutions from continuing to enjoy the benefits of tax-exempt status, and injured parties would be entitled to a judicial declaration precluding the IRS from according tax-exempt status or

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for a single-sex educational scholarship unless the donor can "show that the scholarship substantially furthers an important objective or is otherwise compatible with federal law"). Professor Ginsburg's article criticizes IRS Letter Ruling (Tech. Adv. Mem.) 77-44-007 (July 28, 1977), which upheld the deductibility of a contribution for a sex-restricted scholarship.

[17]The public policy against sex discrimination is sufficiently strong to constitute a compelling governmental interest. *See Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

[18]Title IX's prohibition against sex discrimination in federally funded education does not apply to most private educational institutions and contains an exemption for historically single-sex public institutions. *See* 20 U.S.C. § 1681(a)(1) & (5) (1988).

deductibility of contributions to such institutions.[19]

An unfavorable ruling in VMI would also threaten private single-sex schools and similar charitable organizations with loss of tax-exempt status for a separate and independent reason: under the rationale of *Norwood v. Harrison* and its progeny (discussed above), the Fourteenth Amendment and the equal protection component of the Fifth Amendment could be interpreted to preclude the federal and state governments from continuing to foster and support private sexual discrimination by extending tax-exempt status to organizations that engage in such behavior or by granting tax deductions to persons who contribute to such organizations.[20]

D. The Application of "Strict Scrutiny" Will Exacerbate the Threat to Private Women's Colleges.

Some of the government's *amici* have told the Court that cases such as *Norwood* and *Bob Jones* pose no threat to private women's colleges because these doctrines have been confined to situations involving race discrimination. Brief of Twenty-Six Private Women's Colleges at 19 n.12 & 20-23. Yet the rationale of these cases, as described above,

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[19] *See, e.g., Green v. Connally*, 330 F. Supp. 1150 (D.D.C.) (three-judge court), *aff'd*, 404 U.S. 997 (1971).

[20] *See, e.g., Falkenstein v. Department of Revenue*, 350 F. Supp. 887, 889 (D. Or. 1972) (three-judge court) ("the grant of tax exemptions to . . . a racially exclusive fraternal organization, violates the Equal Protection Clause of the Fourteenth Amendment and must be enjoined"), *appeal dismissed*, 409 U.S. 1099 (1973); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (three-judge court); *Pitts v. Department of Revenue*, 333 F. Supp. 662, 669 (E.D. Wis. 1971) (three-judge court).

is broad enough to encompass other kinds of unconstitutional discrimination as well.

At the same time, the government and other of its *amici* have told this Court that sex discrimination should be treated the same as race discrimination and subjected to "strict scrutiny." Pet. Br. at 33-36; Brief of National Women's Law Center, *et al.*, at 15-30. Apart from whatever else could be said about such a legal development, it would certainly eliminate any remaining doubt that government assistance to private women's colleges would be viewed as unconstitutional.

CONCLUSION

For the reasons stated in this brief, *amicus curiae* Mary Baldwin College requests that this Court affirm the judgment of the court of appeals and permit it to continue implementation of the VWIL program.

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